Supreme Court, U.S.
FILED
FEB 14 2003
CLERK

No. 02-271

IN THE

Supreme Court of the United States

IN RE AGENT ORANGE PRODUCT LIABILITY LITIGATION:

DOW CHEMICAL COMPANY, MONSANTO COMPANY, ET AL.,
Petitioners,

v.

DANIEL RAYMOND STEPHENSON, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR PETITIONERS

ANDREW L. FREY
PHILIP ALLEN LACOVARA
CHARLES A. ROTHFELD
RICHARD B. KATSKEE
MAYER, BROWN, ROWE & MAW
1909 K Street, N.W.
Washington, DC 20006
(202) 263-3000

Counsel for Petitioner
Dow Chemical Company

SETH P. WAXMAN
Counsel of Record
LOUIS R. COHEN
JOSHUA S. GOLDWERT
SHIRLEY C. WOODWARD
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, DC 20037
(202) 663-6000

Counsel for Petitioner
Monsanto Company

(ADDITIONAL PETITIONERS' COUNSEL LISTED ON INSIDE COVER)

MICHELE L. ODORIZZI
MAYER, BROWN, ROWE & MAW
190 South LaSalle Street
Chicago, IL 60603
(312) 782-0600

STEVEN BROCK
RIVKIN RADLER LLP
EAB Plaza
Uniondale, NY 11556
(516) 357-3000

Counsel for Petitioner
Dow Chemical Company

JOHN C. SABETTA
SEYFARTH SHAW
1270 Avenue of the Americas
New York, NY 10020
(212) 218-5500

NOAH A. LEVINE
WILMER, CUTLER & PICKERING
399 Park Avenue
New York, NY 10022
(212) 230-8800

Counsel for Petitioner
Monsanto Company

KELLEY DRYE & WARREN LLP
101 Park Avenue
New York, NY 10178
(212) 808-7800

Counsel for Petitioner
Hercules Incorporated

CADWALADER, WICKERSHAM
& TAFT
100 Maiden Lane
New York, NY 10038
(212) 504-6000

Counsel for Petitioners
Occidental Chemical
Corporation, Ultramar Diamond
Shamrock Corporation, Maxus
Energy Corporation, and
Chemical Land Holdings, Inc.

MYRON KALISH
50 East 79th Street
New York, NY 10021
(212) 737-8142

Counsel for Petitioners
Uniroyal, Incorporated,
C.D.U. Holdings, Incorporated,
and Uniroyal Chemical Company

CLARK GAGLIARDI &
MILLER, P.C.
The Inns of Court
99 Court Street
White Plains, NY 10601
(914) 946-8900

Counsel for Petitioners
T H Agriculture & Nutrition
Company, Incorporated,
Thompson-Hayward Chemical
Company, and Harcros
Chemical, Incorporated

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

I. ONCE ADEQUACY OF CLASS REPRESENTATION HAS BEEN LITIGATED AND RESOLVED, ABSENT CLASS MEMBERS ARE NOT ENTITLED TO RELITIGATE ADEQUACY DE NOVO. 2

A. Determinations Of Adequacy, Made In Accordance With Fundamentally Fair Procedures Such As Those In Rule 23, Are Not Subject To Collateral Attack. 2

B. If Collateral Challenges To Adequacy Of Representation Are Permissible, The Question Must Be Whether The Original Determination Was Fundamentally Unfair Under The Circumstances Then Prevailing. 7

II. RESPONDENTS ARE BOUND BY THE ADEQUACY DETERMINATION MADE IN THE AGENT ORANGE CLASS ACTION. 10

A. The Courts Carefully Implemented The Rule 23 Procedures. 11

B. Respondents Have Not Made The Showing Of Basic Unfairness Necessary To Reopen The Finding Of Adequate Representation. 16

CONCLUSION 20

TABLE OF AUTHORITIES

CASES

Page(s)

Amchem Products, Inc. v. *Windsor*, 521 U.S. 591 (1997) ..... *passim*
American Pipe & Construction Co. v. *Utah*, 414 U.S. 538 (1974) 6, 7
Bousley v. *United States*, 523 U.S. 614 (1998) 8
Brecht v. *Abrahamson*, 507 U.S. 619 (1993) 8
Class Plaintiffs v. *City of Seattle*, 955 F.2d 1268 (9th Cir. 1992) 20
Dusenbery v. *United States*, 122 S. Ct. 694 (2002) 5, 7
Epstein v. *MCA, Inc.*, 179 F.3d 641 (9th Cir. 1999) 4, 5, 9
Grady v. *A.H. Robins Co.*, 839 F.2d 198 (4th Cir.) *cert. dismissed*, 487 U.S. 1260 (1988) 19
Graham v. *Collins*, 506 U.S. 461 (1993) 9
Grimes v. *Vitalink Communication Corp.*, 17 F.3d 1553 (3d Cir. 1994) 5
Hansberry v. *Lee*, 311 U.S. 32 (1940) 2, 3, 6
In re "Agent Orange" Product Liability Litigation, 506 F. Supp. 762 (E.D.N.Y. 1980) 12, 13
In re "Agent Orange" Product Liability Litigation, 100 F.R.D. 718 (E.D.N.Y. 1983) 12, 13, 14
In re "Agent Orange" Product Liability Litigation, 597 F. Supp. 740 (E.D.N.Y. 1984), *aff'd*, 818 F.2d 145 (2d Cir. 1987) 14
In re "Agent Orange" Product Liability Litigation, 611 F. Supp. 1223 (E.D.N.Y. 1985), *aff'd*, 818 F.2d 187 (2d Cir. 1987) 16, 18
In re "Agent Orange" Product Liability Litigation, 818 F.2d 145 (2d Cir. 1987), *cert. denied*, 484 U.S. 1234 (1988) ..... *passim*

TABLE OF AUTHORITIES—Continued

Page(s)

In re "Agent Orange" Product Liability Litigation, 996 F.2d 1425 (2d Cir. 1993), *cert. denied*, 510 U.S. 1140 (1994) 11, 19
In re Three Mile Island Litigation, 87 F.R.D. 433 (M.D. Pa. 1980) 10
In re UNR Industries, Inc., 20 F.3d 766 (7th Cir. 1994) 19
Kane v. *Johns-Manville Corp.*, 843 F.2d 636 (2d Cir. 1988) 19
Mathews v. *Eldridge*, 424 U.S. 319 (1976) 5, 7
Miller v. *Diamond Shamrock Co.*, 275 F.3d 414 (5th Cir. 2001) 17
National Ass'n of Radiation Survivors v. *Walters*, 111 F.R.D. 595 (N.D. Cal. 1986) 10
Nottingham Partners v. *Trans-Lux Corp.*, 925 F.2d 29 (1st Cir. 1991) 5, 20
Ortiz v. *Fibreboard Corp.*, 527 U.S. 815 (1999) 8, 9, 10
Phillips Petroleum Co. v. *Shutts*, 472 U.S. 797 (1985) 3, 4, 5, 6
Ryan v. *Dow Chemical Co.*, 781 F. Supp. 902 (E.D.N.Y. 1991) 10, 13
Ryan v. *Dow Chemical Co.*, 781 F. Supp. 934 (E.D.N.Y. 1992) 17
Sosna v. *Iowa*, 419 U.S. 393 (1975) 19
TBK Partners, Ltd. v. *Western Union Corp.*, 675 F.2d 456 (2nd Cir. 1982) 20
Teague v. *Lane*, 489 U.S. 288 (1989) 8

STATUTES AND RULES

11 U.S.C. § 524(g) 19
Fed. R. Civ. P. 23 ..... *passim*

ARTICLES AND TREATISES

Issacharoff, Samuel, *Governance and Legitimacy in the Law of Class Actions*, 1999 S. Ct. Rev. 337 8

TABLE OF AUTHORITIES—Continued

Page(s)

Newberg, Herbert B. & Alba Conte, NEWBERG ON CLASS ACTIONS § 2:5 (4th ed. 2002) 19

WEINSTEIN, J., INDIVIDUAL JUSTICE IN MASS TORT LITIGATION: THE EFFECT OF CLASS ACTIONS, CONSOLIDATIONS, AND OTHER MULTIPARTY DEVICES (1995) 9

Woolley, Patrick, *The Availability of Collateral Attack for Inadequate Representation in Class Suits*, 79 TEX. L. REV. 383 (2000) 4

7A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 1765 (2d ed 2002) 8

We showed in our opening brief that respondents are not entitled to relitigate, de novo, the adequacy of their representation in the Agent Orange class action. *First*, as long as the courts in that action followed procedures consistent with due process in making the adequacy determination, that determination is binding on respondents as part of the *res judicata* effect of the final judgment. *Second*, even if respondents are permitted to relitigate adequacy now, such a collateral attack must meet a high standard and may succeed only if the courts are persuaded that the prior determination was fundamentally unjust.

Rather than answer these arguments, respondents spend most of their brief attempting to show that the class action district and appellate courts ran roughshod over their rights. But this is a caricature, perhaps drawn from too-swift and collusive settlements in other cases. In *Agent Orange*, two district judges and the court of appeals, confronting the first mass-tort case of its size and kind, carefully analyzed the appropriateness of class treatment, and took steps to ensure that the class received the most effective class notice practicable. Chief Judge Weinstein believed the plaintiffs' claims had essentially no prospect for success—a judgment confirmed in subsequent litigation—yet he engaged in extraordinary efforts that produced a settlement that paid almost $200 million for the benefit of the class, which he, with a special master, then personally allocated so as to assist both ill and asymptomatic class members.

Respondents contend that absent class members may *always* collaterally attack a class judgment by contending they were situated differently from others in the class and therefore did not receive adequate representation, and they assume that such an attack is de novo review by the second set of courts. Then, abandoning the Second Circuit's distinction between class members who manifested illness before and after December 31, 1994, they argue that *all* asymptomatic class members were inadequately represented in this

case. Respondents candidly acknowledge that on their view a determination of adequacy can *never* be final as against absent class members.

I. ONCE ADEQUACY OF CLASS REPRESENTATION HAS BEEN LITIGATED AND RESOLVED, ABSENT CLASS MEMBERS ARE NOT ENTITLED TO RELITIGATE ADEQUACY DE NOVO.

Respondents argue at length (Br. 22-34) that if the Agent Orange class certification were litigated from scratch today, certification would be refused, at least insofar as the class included any then-unimpaired veterans. But that contention is beside the point, for two independent reasons.

A. Determinations Of Adequacy, Made In Accordance With Fundamentally Fair Procedures Such As Those In Rule 23, Are Not Subject To Collateral Attack.

As we have shown, a determination of adequacy reached in accordance with constitutionally adequate and fundamentally fair procedures is not subject to collateral attack, because the absent parties necessarily received all the process that was due. See Pet. Br. 25-41. Respondents and their *amici* have little to say in response to this showing.

First, they cite various authorities (Br. 17) for the proposition that "'the court conducting the action cannot predetermine the *res judicata* effect of the judgment.'" But the question here is not whether Chief Judge Weinstein could, in 1984, "predetermine" the *res judicata* consequences of his court's judgment; it is whether that court's judgment, long ago affirmed and final, *is res judicata*. We have never suggested that courts lack the authority to examine that question in the present case; our argument is that, if acceptable procedures were followed in 1984, the answer must be "yes."

Second, respondents' law professor amici assert principally (Br. 8) that this case is (and *Hansberry* was) "a case about the constitutional limits of legitimate jurisdiction." But

the professors acknowledge that "Justice Stone did not use the word jurisdiction in describing the Court's holding in *Hansberry*" (*id.*). In fact, the outcome in *Hansberry* ultimately turned not on personal jurisdiction, but on the lack of any procedural protections for the persons assertedly represented by the plaintiff in the original litigation and on the fact that the original judgment did not even purport to bind any defendant other than the individuals named. See 311 U.S. at 42-43, 45-46. *Hansberry* did not say that a later court can second-guess a determination of adequacy. Moreover, absent extraordinary circumstances, determinations of jurisdiction *are* given *res judicata* effect. See PLAC *Amicus* Br. at 16-18 (citing authorities).

The law professors seize upon *Hansberry*'s statement that it is a "familiar doctrine of the federal courts" that absent parties may be bound "'where they are in fact adequately represented by parties who are present.'" Law Profs. Br. 10 (quoting 311 U.S. at 43). But this background statement of positive law did not mean that adequacy, once determined, is open to endless relitigation. On the contrary, the Court immediately added that a State could "constitutionally adopt a procedure whereby some of the members of the class could stand in judgment for all, provided that the *procedures* were so devised and applied as to insure that those present are of the same class as those absent and that the litigation is so conducted as to insure the full and fair consideration of the common issue." 311 U.S. at 43 (emphasis added). The plain import of this language, and of the discussion and analysis throughout *Hansberry*, was that the focus in collateral proceedings must be on the efficacy of the previous *procedures* to ensure adequate representation.

Third, respondents and the law professors cite *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797 (1985), for their argument that the absent class members are entitled to a later, de novo consideration of adequacy. But *Shutts* arose on direct review and said nothing about collateral attack on a final (and consummated) judgment or settlement. In particular,

"nowhere in *Shutts* did the Court state or imply that where the certifying court makes a determination of the adequacy of representation in accord with *Shutts*, this determination is subject to collateral attack." *Epstein* v. *MCA, Inc.*, 179 F.3d 641, 648 (9th Cir. 1999).[1] On the contrary, as we explained in our opening brief (Br. 29-30), to the extent that *Shutts* is relevant to the questions presented here, it strongly suggests that procedures like those embodied in Rule 23 afford absent class members the necessary due process.

Fourth, respondents and their law professor *amici* assert that, until the Ninth Circuit's decision in *Epstein*, it had been "universally accepted" that "any absentee (nonparticipating) class member who was purportedly bound by any class action settlement could maintain suit on the underlying claims in a new action provided that she could show that she had not been adequately represented in the original action." Law Profs. Br. 4, 6; Resp. Br. 17-19, 36. That is not the case. Indeed, the article that the law professors describe (Br. 6 n.7) as providing "an excellent overview of this area of law" reports that "[a] series of recent decisions has ignored, and even rejected, the rule that absent class members who have been inadequately represented have a right to collaterally attack the class judgment." Patrick Woolley, *The Availability of Collateral Attack for Inadequate Representation in Class Suits*, 79 TEX. L. REV. 383, 385-86 (2000) (citing decisions from the Third, Sixth, Ninth, and District of Columbia Circuits). Moreover, as we showed in our petition, both the First and Third Circuits held before *Epstein* that absent class members could not relitigate adequacy on collateral review when the certifying court had employed fair procedures in the original class action. See Pet. 9, 13-14 (citing *Nottingham Partners* v. *Trans-Lux Corp.*, 925 F.2d 29 (1st Cir. 1991), and *Grimes* v. *Vitalink Communications Corp.*, 17 F.3d 1553 (3d Cir. 1994)).

[1] The law professors place great emphasis on the statement in *Shutts* that absent class members may "sit back and allow the litigation to run its course." Law Profs. Br. 15 (quoting 472 U.S. at 810). But the Court's point was that they may sit back precisely because the trial court has an unremitting obligation to monitor the adequacy of class counsel and look out for the interests of class members—not because class members can always litigate the issue from scratch later. *Shutts* emphasized that "there are safeguards provided for [the absent class member's] protection"—those safeguards being, as the Court explained, the procedural assurances offered by Rule 23 and its state-law counterparts. 472 U.S. at 809-810. Respondents' and their *amici*'s position creates perverse incentives against participation in direct proceedings, see *infra* at 20.

In our opening brief, we explained that implementation of Rule 23 procedures offers adequate assurance that the absent parties' interests were taken into account in the determination of adequacy; that procedural due process jurisprudence in all other contexts is directed at the procedures used in the generality of cases, rather than at the outcome in a particular case; that the private and societal interests that are elements of the due process equation dictate rejection of de novo relitigation of adequacy; and that disturbing the finality of the class judgment would impair *petitioners'* due process rights. Respondents and their *amici* make no response at all to these points.

The closest they come is the law professors' assertion that the "open-ended balancing test outlined in *Mathews* v. *Eldridge*" is "not the appropriate test for procedural questions that this Court has traditionally analyzed through more directly relevant precedents," and that "adequacy is the linchpin of the constitutional exercise of jurisdiction." Law Profs. Br. 19 (citing *Dusenbery* v. *United States*, 122 S. Ct. 694, 699 (2002)). But the importance of the adequacy question does not mean that a prior determination should be *relitigated* de novo. And while the Court does not apply *Mathews* in all circumstances, the case cited by the law professors *also* rejects any bright-line rule, identifying the requirement of due process as "reasonableness under the circumstances." *Dusenbery*, 122 S. Ct. at 699. Indeed, the Court engaged in precisely the same weighing of interests in *Shutts*, holding that, "[b]ecause States place fewer burdens upon absent class plaintiffs than they do upon absent defendants in nonclass

suits, the Due Process Clause need not and does not afford the former as much protection from state-court jurisdiction as it does the latter." 472 U.S. at 811. Under this analysis, as we have previously argued (Br. 42-43), the competing interests at stake here preclude de novo relitigation of adequacy, as long as the procedures followed in the Agent Orange class action were designed "to insure that those present are of the same class as those absent and that the litigation is so conducted as to insure the full and fair consideration of the common issue." *Hansberry*, 311 U.S. at 43.

Rule 23 provides such procedures. As respondents concede (Br. 32 n.36), Rule 23 charges certifying courts with making findings and managing class actions in ways that satisfy due process requirements. Compare, *e.g.*, Fed. R. Civ. P. 23(a)(4) & (c)(2) with *Shutts*, 472 U.S. at 812.[2] These protections were designed specifically "to assure that members of the class would be identified before trial on the merits and would be bound by all subsequent orders and judgments." *American Pipe & Constr. Co.* v. *Utah*, 414 U.S. 538, 547 (1974); Pet. Br. 27 (citing authorities). The machinery of Rule 23 itself thus ensures that the class will receive the "process" that is "due" under the Constitution. To hold otherwise would mean that class actions could not function as the rules contemplate because no amount of conscientious compliance would prevent class members from later escaping the class judgment by finding a friendlier court.[3]

---

[2] Respondents contend (Br. 19) that the forward-looking nature of a Rule 23(a)(4) finding "dictates" that absent class members must be permitted to relitigate adequacy of representation in a second action. But as respondents later concede, a certifying court has a duty to monitor adequacy throughout the class-action litigation. See *id.* at 33. The fact that the initial determination of adequacy is not the only determination does not mean that the final judgment is subject to reopening.

[3] The 1966 amendments were specifically designed to eliminate this sort of one-sidedness, which had been a feature of the so-called "spurious" class action. See *American Pipe*, 414 U.S. at 547; PLAC *Amicus* Br. 7-10. This Court has recognized that it is "unfair to allow members of a class to benefit from a favorable judgment without subjecting themselves to the binding effect of an unfavorable one." *American Pipe*, 414 U.S. at 547.

B. If Collateral Challenges To Adequacy Of Representation Are Permissible, The Question Must Be Whether The Original Determination Was Fundamentally Unfair Under The Circumstances Then Prevailing.

Our opening brief showed that if respondents *are* permitted to collaterally attack the adequacy determination, the proper inquiry is not whether the present court would reach a different conclusion today, but whether the initial determination was so prejudicial to absent class members that it cannot be allowed to stand, even in light of the reliance interests of the parties and society. We also showed that such an attack must be resolved in accordance with the law and facts as they existed at the time of the initial judgment. Respondents and their *amici* offer virtually no answer to these points.

1. Our opening brief explained why the showings necessary to establish inadequate representation must differ in direct and collateral proceedings. The balance of interests—of the considerations regarded as determinative in decisions like *Mathews* and *Dusenbery*—is decisively different. In collateral proceedings, there has by definition *been* a complete prior process, and there is no reason to presume that the second-round courts will get a better answer to the same question. In collateral proceedings, both the parties and society may have strong interests in the finality of a prior determination on which they have relied. The Court's decisions in the closely analogous habeas context, where a mechanism *is* available for advancing collateral challenges to constitutional errors in criminal proceedings, impose a test similar to that we suggest here: that the prior decision is not merely wrong, in the view of the later court, but so fundamentally defective that it cannot now be allowed to stand. See Pet. Br. 42-44.

Respondents and their *amici* have literally nothing to say about most of this. Indeed, although respondents assert (Br. 38-41) that they satisfy the higher standard applicable to collateral attacks—a point we address below—they nowhere explain why such a higher test should not apply.[4]

Respondents and their *amici* do suggest that the habeas analogy is inapt because criminal defendants control the initial litigation that gave rise to the challenged judgment. But the Court's jurisprudence recognizes that "there are significant and compelling parallels" between the application of finality principles in the criminal and civil contexts, and that finality concerns "'should not have *as much* place in criminal as in civil litigation.'" *Teague* v. *Lane*, 489 U.S. 288, 309 (1989) (plurality opinion) (emphasis in original). See also *Brecht* v. *Abrahamson*, 507 U.S. 619, 638-39 (1993); *Bousley* v. *United States*, 523 U.S. 614, 621 (1998) (per curiam); Pet. Br. 48; Samuel Issacharoff, *Governance and Legitimacy in the Law of Class Actions*, 1999 S. Ct. Rev. 337, 373 (1999) (allowing absent class members broad rights of collateral attack would perversely give them greater ability to challenge final judgments than capital defendants).

2. In our opening brief we also argued (Br. 49-50) that, if a collateral challenge is allowed in this case, it should not be governed by the rule stated in *Amchem Products, Inc.* v. *Windsor*, 521 U.S. 591 (1997), and *Ortiz* v. *Fibreboard Corp.*, 527 U.S. 815 (1999), which discourages the combination of ill and asymptomatic plaintiffs in a single class. First, *Amchem* and *Ortiz*, which arose on direct review, did not announce due process rules at all and therefore do not govern respondents' due process challenge to the binding effect of the settlement. Moreover, *Amchem* effectively stated a new

[4] Under the de novo review standard respondents propose, the original district court's adequacy determination would actually get *less* deference on collateral review than on direct appeal, where it is reviewed for abuse of discretion. See 7A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 1765, at 271-273 (2d ed. 2002).

rule on this point, and new rules may not govern in collateral proceedings. Respondents do not take issue with the proposition that principles of finality bar the application of newly articulated legal standards in collateral attacks on earlier final judgments. Their argument (Br. 30-32) is confined to the assertion that *Amchem* did not state a new rule.

It is *respondents*' burden, however, to demonstrate that "reasonable jurists" "'would have felt compelled by existing precedent'" to rule in *their* favor (*i.e.*, to have held class representation inadequate) in 1983 and 1984. *Graham* v. *Collins*, 506 U.S. 461, 467 (1993). See Pet. Br. 49 n.13. It is not sufficient for them to observe that "neither *Amchem* nor *Ortiz* explicitly or even implicitly overrules any precedent of this Court." Law Profs. Br. 27 (footnote omitted). *Amchem* plainly did state a "new rule" in this sense by requiring outcomes that had not been required by pre-existing precedent. *Amchem* itself noted that the lower courts had been divided on matters relating to "court surveillance under Rule 23's certification criteria" (521 U.S. at 618), and *Ortiz* subsequently explained that it is obvious only "*after Amchem* that a class divided between holders of present and future claims * * * requires division into homogeneous subclasses." 527 U.S. at 856 (emphasis added). The Second Circuit agreed, labeling *Amchem* and *Ortiz* "landmark" decisions; indeed, the holding below was driven by the court of appeals' belief that it had to "determine the effect" of those holdings "on a previously settled class action." Pet. App. 1a-2a; accord *Epstein*, 179 F.3d at 651 (Thomas, J., dissenting) (*Amchem* "heralded a new era of judicial scrutiny of class action certification and settlement").

Existing precedent at the time of the Agent Orange class action did *not* require exclusion of future claimants. The use of class actions to address mass exposure torts was in its infancy in the early 1980's, and in many ways the Agent Orange litigation was the first of its type. Indeed, Chief Judge Weinstein literally wrote the book on how courts should address mass tort claims (J. Weinstein, INDIVIDUAL JUSTICE IN

MASS TORT LITIGATION: THE EFFECT OF CLASS ACTIONS, CONSOLIDATIONS, AND OTHER MULTIPARTY DEVICES (1995)), and this Court cited his analysis with approval in *Amchem*. See 521 U.S. at 618. Moreover, at the time of the Agent Orange litigation, certification of classes including present and future claimants *had* been found proper.[5] Existing precedent simply did not compel the outcome respondents advocate today.[6]

II. RESPONDENTS ARE BOUND BY THE ADEQUACY DETERMINATION MADE IN THE AGENT ORANGE CLASS ACTION.

In the Agent Orange class action, Judge Pratt, Judge Weinstein, and the Second Circuit carefully implemented the Rule 23 procedures and took extraordinary measures to ensure that the interests of all class members, including asymptomatic members like respondents, were fairly and adequately protected by the class representatives. Respondents' attempt to compare this case—with its more than 60 opinions, see *Ryan* v. *Dow Chemical Co.*, 781 F. Supp. 902, 904-07 (E.D.N.Y. 1991) (listing opinions)—to the kind of lightly

[5] See *National Ass'n of Radiation Survivors* v. *Walters*, 111 F.R.D. 595, 597 (N.D. Cal. 1986) (class of all past, present, and future claimants for disability stemming from exposure to atomic bomb tests); *In Re Three Mile Island Litigation*, 87 F.R.D. 433, 442 (M.D. Pa. 1980) (class for medical monitoring claims of all persons within 25-mile radius of Three Mile Island, including both ill and asymptomatic persons).

[6] Respondents cite (Br. 30 n.33) a 1983 district court decision to support the proposition that future and present claimants may not be in the same class. But the class in that case was decertified not because of potential conflict, but because intervening changes in state law meant that common questions no longer predominated. Respondents cite (Br. 30 n.34) a Seventh Circuit decision for the proposition that *Amchem* and *Ortiz* "are not exactly novelties." But that case cited *Ortiz* only to note that class members are ordinarily entitled to opt-out; it did not cite *Amchem* at all, nor did it speak to the present-futures conflict issue. The other decisions cited by respondents do not involve the present-future claimants problem confronted in *Amchem* and *Ortiz*.

publicized, quickly concluded, collusive bargain generally feared by policy makers is utterly misplaced.

A. The Courts Carefully Implemented The Rule 23 Procedures.

1. Respondents assert repeatedly that at the time of certification the class was not understood to include asymptomatic veterans. This is just wrong: all participants in the litigation, including the special masters and judges, understood that the class would include all veterans who had been exposed to Agent Orange. The plaintiffs' central theory of liability was that anyone who had been exposed to even a molecule of Agent Orange had suffered compensable "injury," whether or not he or she had developed symptoms. See, *e.g.*, *Ivy/Hartman*, 996 F.2d at 1433 ("From the very outset of the litigation in *Agent Orange I*, the plaintiffs adopted this [exposure as "injury"] meaning and urged it repeatedly upon the district court.").[7] Judges Pratt and

[7] See also Mem. of Law in Supp. of Defs.' Mot. Under Rules 12(b) and 12(f), at 13-14, No. 79 C 1195 (E.D.N.Y. Sept. 14, 1979) (moving to strike claims made on behalf of persons assertedly "at risk" of illness due to Agent Orange exposure); JA 48, 61-62 (lead plaintiffs' counsel espousing "one hit" theory of causation that all exposed veterans suffered some form of personal injury); 506 F. Supp. 762, 791 (E.D.N.Y. 1980) (discussing best practicable notice to "the over two million Vietnam Veterans and their families who are included in the class"); Pls.' Reply to Defs.' Objections and Modifications Regarding Class Action Certif. and Notice at 3-4, MDL No. 381 (E.D.N.Y. Jan. 26, 1981) ("The Court's description of the class does not require any further refinement at this time. * * * The class for purposes of the trial of the government contract defense issue is the entire class of 2.5 million Vietnam Veterans and their families."); Tr. of Hearing before Special Master at 1672, MDL No. 381 (E.D.N.Y. Sept. 2, 1982) (statement by lead plaintiffs' counsel that he represented the "2,456,000 men who went to Vietnam who were exposed to Dioxin contaminated Phenoxy herbicides. That is the class"); Defs.' Reply Mem. in Opp'n to Class Certif. at 7, MDL No. 381 (E.D.N.Y. Jan. 15, 1983) (acknowledging that plaintiffs sought to "represent the interests of a class of over 2.4 million Vietnam veterans"); Pet. for Writ of Cert. at 2 (No. 80-1882), filed Apr. 29, 1981 (asserting that "[t]he plaintiffs are the class of all those United States veterans who served in Southeast Asia during the

Weinstein expressly and repeatedly recognized that point prior to certification. See, *e.g.*, 506 F. Supp. at 787 ("plaintiffs have moved for a conditional order pursuant to F.R.C.P. 23 permitting the suit to proceed as a class action on behalf of all persons exposed to Agent Orange and various members of their families"); Tr. of Oral Arg. at 46, MDL No. 381 (E.D.N.Y. Nov. 7, 1983) (Weinstein, C.J.: "Anybody in Vietnam during this period is prospectively with the class"). Respondents' assertion (Br. 40) that the class was "expanded to include futures" at the time of settlement is incorrect. When the class definition and notice referred to veterans "injured" in Vietnam by exposure to Agent Orange (see Pet. Br. 5), participants knew this meant all veterans.

2. Contrary to respondents' assertion that no procedures were followed to assure adequacy of representation and notice, these matters were raised repeatedly, and Judges Pratt and Weinstein, as well as the Second Circuit, were fully aware of the requirements of Rule 23 as they resolved them. These matters were argued and briefed, both in the district court and in the court of appeals, and both in general[8] and with particular reference to the "futures".[9]

'Viet Nam War' and were exposed to chemical defoliants"). A reference by Judge Weinstein to the "potential size" of the class as "tens of thousands," 100 F.R.D. at 720, relates, in context, to the number of claimants with already-manifested disease whose individual suits would, absent certification, immediately clog the courts.

[8] *E.g.*, Dow Mem. in Opp. to Certif. of Class Action at 13, No. 79 C 1195 (E.D.N.Y. Sept. 26, 1979) (arguing that interests of named parties might be antagonistic to interests of class); Tr. of Hearing before Judge Pratt, at 85-86, MDL No. 381 (E.D.N.Y. Jan. 31, 1981) (def. attorney raising adequacy of representation concerns); Defs.' Supp. Mem. in Opp. to Class Certif., MDL No. 381, at 10-11 (E.D.N.Y. Nov. 17, 1982) (arguing for mail notification to each of 2.4 million Vietnam veterans); Defs.' Reply Mem. in Opp. to Class Certif., MDL No. 381, at 5 (E.D.N.Y. Jan. 15, 1983) (same).

[9] See Mot. to Certify a Subclass Whose Members Object to the Terms of Settlement and to Appoint Counsel for that Subclass at 11-12, MDL No. 381 (July 5, 1984) (arguing that notice was insufficient as to

Precisely because this was not a collusive suit, the judges were *forced* to focus on compliance with Rule 23's requirements: the defendants consistently opposed certification and vigorously litigated the matter. In nevertheless determining to certify the class, Judge Pratt expressly indicated awareness of his obligation to assure adequate class representation. See 506 F. Supp. at 788. The point was reiterated by Chief Judge Weinstein when he assumed responsibility for the case and (again over the defendants' objections) confirmed the certification decision. See 100 F.R.D. at 720-721.[10] As Chief Judge Weinstein subsequently explained, "[a]ll of the courts which considered the Agent Orange Settlement were fully cognizant of the conflict arguments now hypothesized by the plaintiffs" and determined that they did not preclude class certification. 781 F. Supp. at 919. The court of appeals agreed that class representation was ade-

---

asymptomatic veterans and calling for briefing on "whether the present class representatives, who have manifested injury and claimed injury," adequately represented them); Objection of William P. Stimson to Proposed Settlement of Class Action (JA 124) (arguing that notice was inadequate as to futures); Mem. in Supp. of Pls.' Mot. Pursuant to Rules 52(b) and 59(e), at 155-158, 174, 184-200, MDL No. 381 (E.D.N.Y. Mar. 7, 1985) (arguing that futures received inadequate notice and representation); Master Br. of Appellants at 42-44, 53-55 & n.43, No. 84-6273 (2d Cir. Jan. 13, 1986) (arguing before court of appeals that futures received inadequate notice and were inadequately represented); Reply Br. of Appellants (Reply to PMC's Br.) at 2, 11-16, No. 84-6273 (2d Cir. Mar. 27, 1986) (repeating arguments that futures received inadequate notice and representation).

[10] Respondents argue (Br. 28, 32) that (i) the district court could not properly determine adequacy under Rule 23(a)(4) because class representatives had not been identified and (ii) it was unfair to them that the representatives finally selected included no asymptomatic persons. But Rule 23 expressly permits conditional determinations before representatives are selected (see 1966 Amend. advisory comm. note), and in this case the ultimate selection was consciously designed to *help* respondents: Judge Weinstein expressly required representatives who would exemplify the claimed illnesses to the jury, 100 F.R.D. at 723, and the representatives had no role in allocating the settlement amount.

quate and upheld certification, rejecting (818 F.2d at 166-167) allegations of intraclass conflicts identical to the allegations made in the current round of litigation.

Chief Judge Weinstein also made extraordinary efforts to satisfy his obligation under Rule 23(e) to assure the fairness of the class settlement. He required that notice of the settlement be provided (1) by mail to all known class members and (2) generally by publication. He then held eleven days of fairness hearings in five cities, where he heard from almost 500 witnesses. See Pet. Br. 7-8. He noted: "We have a number of people who have testified at these hearings who say we don't have an injury now, but we are concerned about the future." Tr. of Hearing (Aug. 10, 1984) (JA 129). He ultimately approved the fairness of the settlement in an opinion that ran more than 100 pages in the Federal Supplement. See 597 F. Supp. at 746-858.

3. Respondents contend (Br. 22-27) that the class notice was inadequate because (1) asymptomatic veterans who received the notice would not have recognized themselves as having been "injured" by Agent Orange; and (2) notice to "futures" claimants is never constitutionally permissible. These contentions were expressly left unresolved by the court of appeals (which had affirmed the adequacy of the class notice in *Agent Orange I* but evidently believed that the matter had been cast in doubt by *Amchem* (see Pet. App. 19a n.8)), and they are outside the scope of the questions presented in the petition for certiorari. But Chief Judge Weinstein, of course, was familiar with the obligation to provide adequate class notice. Rejecting *petitioners'* argument that all class members should receive individualized notice, he implemented an elaborate regime for notifying class members that he regarded as "the best reasonable and practicable notice under the circumstances of this litigation." 100 F.R.D. at 731.[11] Chief Judge Weinstein's notification procedure was

[11] The notice was extensively distributed and, by all appearances, effective. Chief Judge Weinstein required that letter notice be sent to the more than 100,000 class members who could be readily identified. See 818 F.2d at 167, 169. That was supplemented by extensive broadcast and print announcements in general, armed forces and veterans' media, and requests that state governors have their state's veterans' agencies directly notify all ascertainable class members. See Pet. Br. 6-7.

upheld by the Second Circuit, which determined that the method of notification used an "approach appropriate to this unique case" and "was fully adequate under the circumstances." 818 F.2d at 167, 169.

Respondents contend nonetheless that asymptomatic veterans who received the class certification notice would not have understood themselves to be members of the class. The contemporary understanding of the judges and parties (who recognized the scope of the class and crafted and reviewed the notice) calls this contention into question; so too do news stories published widely before the settlement was announced that indicated that the class action was being maintained on behalf of all Vietnam veterans who may have been exposed to Agent Orange.[12] Indeed, in upholding the ade-

[12] See, *e.g.*, *U.S. Kept As Defendant in Agent Orange Suit*, New York Times, Dec. 20, 1983 ("The suit is a class action brought in the name of all veterans in American, Australian and New Zealand forces who served in Vietnam from 1961 to 1972. All will be bound by the outcome except those who request exclusion."); *New Complications in Agent Orange Trial*, New York Times, Jan. 1, 1984 (the suit includes veterans who are currently ill as well as those "who may come forward in the future to claim injury"); *Papers Released in Agent Orange Case*, St. Louis Globe-Democrat, May 1, 1982 ("[T]he suit covers all 2.5 million veterans of the war."); *Veterans Charge Product Liability*, Indianapolis News, Sept. 1, 1981 ("According to Victor Yannacone, who is spearheading the veterans' case, the class includes 'all the vets who served in Vietnam (about 2.4 million) - together with their families, who are suffering the ill effects or who may suffer the ill effects of their exposure to the toxic synthetic organic chemicals such as those in Agent Orange.'"); *Agent Orange Battle Continues in Courtrooms Across Country*, Vineland (N.J.) Times J., Mar. 12, 1981 ("2.48 million Vietnam veterans and their families"); *Local Man Recalls Agent Orange*, Houma (La.) Courier, Feb. 1, 1981 ("2.48 million Vietnam veterans and their families"); *Business Week*, Mar. 24, 1980 ("the 2.4 million veterans who might have been exposed to Agent Orange"); see also William R. Corson, *The Vietnam*

quacy of the class notice, the Second Circuit took "judicial notice of the widespread publicity this litigation has received." *Id.* at 169. As the court of appeals recognized, *id.*, "[g]iven the great doubt as to whether anyone at all was injured by Agent Orange, the fact that some 240,000 claims have been filed suggests that no practical problem exists as to the adequacy of the notice." If there is any doubt on this score, and if the Court regards the issue as relevant to the disposition of the case, the matter should be remanded to the district court so that the record may be perfected on matters including, for example, efforts of veterans groups to notify affected class members, publicity regarding the case, and recipients' understanding of the class notice.

B. Respondents Have Not Made The Showing Of Basic Unfairness Necessary To Reopen The Finding Of Adequate Representation.

In an effort to show basic unfairness sufficient to justify disturbing the final judgment in the Agent Orange class action, respondents argue (Br. 39-40) that (1) they had no reason "to liquidate their claims" at a time when they were asymptomatic and (2) petitioners are somehow responsible for the inadequacy of class representation. These arguments are insubstantial.

1. There was no prejudicial conflict within the class. When the Agent Orange class action was brought, both ill and asymptomatic class members had one overriding interest in common: to establish liability and extract the largest possible judgment from petitioners. Moreover, as Judge Pratt, Chief Judge Weinstein and the Second Circuit all recognized, both ill and asymptomatic class members faced the same overwhelming obstacles: lack of evidence of causation and a government contractor defense, both of which made any recovery highly unlikely. See 818 F.2d at 166-167; 611 F.

Veterans Adviser, Penthouse (Apr. 1984) ("all veterans of the United States, Australia and New Zealand who served in Vietnam").

Supp. at 1263. For all that appeared in 1984, Agent Orange claims were wholly unpromising, and the claims of opt-outs were in fact later dismissed on the merits by Chief Judge Weinstein, who was affirmed by the Second Circuit. Nevertheless, both ill and asymptomatic class members did achieve an important benefit: a $200 million settlement that benefited both.

Respondents now argue that they would have chosen to forgo the benefits of class membership, but this argument depends entirely on hindsight. Respondents did not know in 1984 that they would fall ill after the 10-year coverage period, and there was no assurance, or even likelihood, that the scientific[13] or legal[14] underpinnings of their claims would grow stronger over the years. To the contrary, as Chief Judge Weinstein explained, it appeared that claims brought in the future would be *weaker* in significant respects because, as

---

[13] For example, an epidemiological study of 1,149 Vietnam veterans most heavily exposed (the so-called Ranch Hand veterans who applied Agent Orange) has tracked 266 possible health effects over 20 years but has not identified *any* health effects caused by Agent Orange. Epidemiologic Investigation of Health Effects in Air Force Personnel Following Exposure To Herbicides, Vol I: 1997 Follow-up Examination Results, Final Report May 1997-Feb. 2000, NTIS No. ADA408237, Executive Summary. And the Institute of Medicine reports to which respondents now point as "establishing" causation (Br. at 13), merely categorize diseases for determination of veteran benefits "based on 'statistical association,' *not on causality*," and emphatically do *not* apply "standard criteria used in epidemiology for assessing causality." See Institute of Medicine, Veterans and Agent Orange: Update 2000 at 6 (emphasis added).

[14] The military contractor defense still presents a forbidding threshold barrier. Respondents' assertion (Br. 10 n.14) that Chief Judge Weinstein "reevaluated his position" in a subsequent decision is incorrect. The decision says only that the set of defendants who may invoke the federal officer removal statute is smaller than the set who may invoke the military contractor defense. *Ryan* v. *Dow Chem. Co.*, 781 F. Supp. 934, 945 (E.D.N.Y. 1992). The Fifth Circuit recently recognized the continuing applicability of the military contractor defense to Agent Orange claims. See *Miller* v. *Diamond Shamrock Co.*, 275 F.3d 414, 421-22 (5th Cir. 2001).

time went by, illness would "have a relatively diminished connection with Agent Orange exposure in terms of both public perception and the likelihood of intervening or contributing causes." 611 F. Supp. at 1418.

The principal source of intraclass conflict identified by respondents and the court below—tension over the allocation of settlement proceeds between ill and asymptomatic claimants—did not stem from any feature of class representation. Quite the contrary: the settlement negotiated by class counsel simply provided an undifferentiated lump sum for the benefit of the class as a whole, along with the proviso that unspecified portions of the settlement would go both to currently disabled veterans and to those who became disabled in the future; the precise allocation of funds and the nature of the eligibility rules were left open. See Pet. Br. 7, 9-11; JA 111-113. The judgment was entered on condition that the *court*, with a clear understanding of its fiduciary obligations to those not present, would resolve the distributional issues. And as we explained in our opening brief, no conflict over the distribution of the settlement funds ever arose because Chief Judge Weinstein, after enormous effort and with the help of a special master, developed his *own* allocation plan—after issuing an additional notice, holding an additional hearing, and considering not only all plans submitted by the litigants, but also plans and suggestions from veterans' groups and interested individuals. *Agent Orange I*, 818 F.2d at 157-158; see Pet. Br. 45. Respondents' complaint, therefore, is not with anything done by their representatives, but with a plan devised by a judge who unquestionably was acting as a fiduciary for the entire class.

2. The further suggestion that petitioners are somehow to blame for respondents' current dissatisfaction with the settlement is meritless. Petitioners consistently *opposed* class certification; they sought the provision of personal letter notice to the class members; they were prepared to litigate the case and settled literally on the morning of trial—under great pressure from the trial judge—only after engaging in

negotiations that were arms-length, contentious, "even fierce" (*Ivy/Hartman*, 996 F.2d at 1436); they had nothing to do with development of the settlement allocation formula. There was nothing the least bit collusive about this settlement. Compare *Amchem*, 521 U.S. at 620.

The inequitable impact on petitioners of reopening the class judgment is manifest. Petitioners believed the class claims to be groundless. When nevertheless faced with a certified class, and pressed by the judge to settle, they did so only because they understood that all members of the class would be bound by the judgment. They then paid a substantial sum, much of which went to benefit then-asymptomatic plaintiffs in the form of direct payments to those who became ill prior to 1995 and indirect assistance to all class members through the Class Assistance Program. Yet now that the funds have been disbursed, petitioners find themselves facing renewed litigation and possible additional liability. The Due Process Clause should not bring about such a result.[15]

---

[15] Respondents are incorrect to argue (Br. 35-36) that they cannot be bound by the settlement because, since they were not ill in 1984, they lacked Article III standing to be included in the class. Only named class representatives need establish individual standing; unnamed class members need not individually satisfy standing requirements. See 1 H. Newberg & A. Conte, NEWBERG ON CLASS ACTIONS § 2:5 (4th ed. 2002). cf. *Sosna* v. *Iowa*, 419 U.S. 393, 403 (1975). In any event, state and federal courts (and in particular bankruptcy courts) routinely resolve future, unaccrued tort claims. See *Kane* v. *Johns-Manville Corp.*, 843 F.2d 636 (2d Cir. 1988) (confirming plan of reorganization resolving both present and future-arising asbestos-related injury claims); *In re UNR Indus., Inc.*, 20 F.3d 766, 770 (7th Cir. 1994) ("treating as 'creditors' persons whose injuries are not yet manifest" comports with Art. III standing because "the injury is real enough" even if "the identity of the victims remains to be ascertained"); 11 U.S.C. § 524(g) (expressly approving the creation of trusts, in bankruptcy, on the model of *Johns-Manville* and *UNR*, to address current and future-arising claims for asbestos-related injury); see also *Grady* v. *A.H. Robins Co.*, 839 F.2d 198, 203 (4th Cir.) (holding, in bankruptcy of the manufacturer of the Dalkon Shield, that a creditor holds "claim" in bankruptcy, to be resolved in bankruptcy court, if "the acts constituting the tort or breach of warranty have occurred prior to the fil-

The decision below would create perverse and unfair incentives for absent class members. In all cases, they could avoid the effort and risk of asserting their rights, enjoy the benefits of any favorable judgment or settlement, and mount a de novo collateral attack in a chosen new forum whenever they believe circumstances later warrant. The rule announced below would curtail both the fairness and the usefulness of the class action, and it would discourage settlements because defendants would remain at risk of later second-round liability. It is important that this Court reaffirm the principle that determinations of adequacy of representation, reached in proceedings that afford due process, *are* binding on all class members.

CONCLUSION

The decision of the Second Circuit should be reversed.

---

ing of the petition," even if the injury is not yet manifest), cert. dismissed, 487 U.S. 1260 (1988). Persons holding such claims have a currently cognizable interest in an action intended to obtain a fund from which they can ultimately obtain compensation. For that reason, class action settlements routinely include releases waiving future claims. See *Class Plaintiffs* v. *City of Seattle*, 955 F.2d 1268, 1287 (9th Cir.1992) (weight of authority holds that federal court may release not only those claims alleged in the complaint, but also claim "based on the identical factual predicate as that underlying the claims in the settled class action even though the claim was not presented and might not have been presentable in the class action") (quoting *TBK Partners, Ltd.* v. *Western Union Corp.*, 675 F.2d 456, 460 (2d Cir.1982)); *Nottingham Partners* v. *Trans-Lux Corp.*, 925 F.2d 29, 34 (1st Cir. 1991) (a "court can approve and enforce a settlement which requires a party to release claims actually brought, or potentially 'bringable'").

Respectfully submitted,

ANDREW L. FREY
PHILIP ALLEN LACOVARA
CHARLES A. ROTHFELD
RICHARD B. KATSKEE
MAYER, BROWN, ROWE & MAW
1909 K Street, N.W.
Washington, DC 20006
(202) 263-3000

Counsel for Petitioner
Dow Chemical Company

SETH P. WAXMAN
Counsel of Record
LOUIS R. COHEN
JOSHUA S. GOLDWERT
SHIRLEY C. WOODWARD
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, DC 20037
(202) 663-6000

Counsel for Petitioner
Monsanto Company

FEBRUARY 2003